Supreme Court, U.S.
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No. 93-1999

In The

Supreme Court of the United States

October Term, 1994

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

J.A. SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California

PETITIONER'S REPLY MEMORANDUM

FREDERICK DOUGLAS BAKER
Counsel of Record
SEDGWICK, DETERT, MORAN & ARNOLD
One Embarcadero Center, 16th Floor
San Francisco, California 94111
Telephone: (415) 781-7900

HOWARD V. GOLUB
J. MICHAEL REIDENBACH
MICHAEL D. WHELAN
PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street, Room 2885
San Francisco, California 94105
Telephone: (415) 973-7012

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. RESPONDENT'S WAIVER ARGUMENT IS MERITLESS

Respondent's contention that PG&E has waived its right to challenge the California court's finding of state action is meritless. Where "the state appellate court considered and passed upon the constitutional question" it is irrelevant when or how the issue was raised; the Court may grant certiorari to review the lower court's constitutional ruling. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 298-99, n.3 (1971).

II. THE CALIFORNIA COURT'S DECISION WAS BASED ON FEDERAL CONSTITUTIONAL GROUNDS

The California court said that Savage's "right of recovery depends ultimately on whether PG&E acted unlawfully." (Pet. App., p. 21a.) After discussing a number of lower court decisions finding discriminatory treatment of the press by public officials unconstitutional under the First Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution, the California court said:

> The broad statutory language of PUC section 453 may be reasonably construed as applying to the kind of discriminatory treatment of the press prohibited by the First Amendment and equal protection clause.

(Pet. App., p. 28a.)

It could scarcely be clearer that the California court based its ruling on the First Amendment and the Fourteenth Amendment to the United States Constitution.

Inexplicably, however, respondent asserts that the court was talking about the California Constitution, citing page 24 of the opinion. (Pet. App., p. 24a.) There, however, the court was merely discussing the holding of *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458 (1979), which *was* decided on California constitutional grounds. *Nowhere* did the court so much as mention the California Constitution in connection with *this* case.

Respondent's contention (Br. in Opp., pp. 12-15) that the "lower court opinion concluded that PG&E's conduct violated the California equal protection clause, not the federal equal protection clause" is clearly wrong and flatly at odds with the plain language of the Court of Appeal's decision.

III. THE CALIFORNIA COURT'S DECISION DOES NOT REST ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The core holding of the California court was this:

> "Discriminatory governmental action aimed at the communicative impact of expression is presumptively at odds with the First Amendment." [Citations.] "While public officials need not furnish information, other than public records, to any news agency, a public official may not constitutionally deny to one media access that is enjoyed by other media, because one media is entitled to the same right of access as any other." [Citations.]

(Pet. App., p. 25a.)

PG&E is the "government" and its representatives are "public officials," the court said, because it is "a

public utility enjoying . . . extensive monopolistic authority 'affected with a public interest.'" (*Id.*, p. 27a.) Thus, the court said, to the extent PG&E denied Savage access enjoyed by other reporters, PG&E engaged in conduct "prohibited by the First Amendment and equal protection clause," which in turn may violate PUC section 453. (*Id.*, p. 28a.)

The findings of state action and violations of federal constitutional rights were critical and indispensable to the California court's analysis. The California court does not remotely suggest that PG&E's conduct could trigger liability under PUC section 453 in the absence of the purported violation of Savage's rights under the First Amendment and Fourteenth Amendment to the United States Constitution.

Respondent's contention that the California court's decision rests on adequate state grounds is plainly without merit.

IV. CONCLUSION

PG&E urges the Court to grant the petition for a writ of certiorari, and to accept this case as a companion to *Lebron v. National Railroad Passenger Corp. (Amtrak)*, No. 93-1525, *cert. granted* (May 23, 1994).

Respectfully submitted,

FREDERICK D. BAKER
Counsel of Record
SEDGWICK, DETERT, MORAN
& ARNOLD

Counsel for Petitioner